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IN THE

Supreme Court of the United States

PANOS T. TSOLAINOS,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Confrontation Clause of the Sixth Amendment, as recently examined by this Court in *Crawford v. Washington*, 124 S. Ct. 1354 (2004), extends to testimonial evidence admitted at a pre-trial hearing to establish a *prima facie* case of conspiracy in order to lay the foundation for admitting "other crimes evidence" at the defendant's second degree murder trial?

2. Whether a police informant's out-of-court testimony in the form of a tape recorded conversation with an alleged co-conspirator constitutes "testimonial" evidence and thus, under *Crawford*, is subject to the Confrontation Clause?

3. Whether, even if a police informant's testimony constitutes "non-testimonial" evidence, this Court should consider the admissibility of non-testimonial evidence, which was left open by *Crawford*, and determine whether the out-of-court testimony of a police informant who is promised compensation by law enforcement for delivering "results" is subject to the Confrontation Clause?

4. Whether the Confrontation Clause permits the admission of an alleged co-conspirator's out-of-court statement when the foundation for its admission, the showing of a *prima facie* case of an alleged conspiracy, is established solely by hearsay evidence and thereafter, at trial for an entirely different crime, the statement is admitted as "reliable" based on that same hearsay evidence, all raising "bootstrapping" and Confrontation Clause implications under this Court's prior decisions, including in *Crawford*; *Lilly v. Virginia*, 527 U.S. 116, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999); *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990); and *Bourjaily v. United States*, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987)?

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OPINIONS BELOW

The judgment of the Louisiana Court of Appeal for the First Circuit was unpublished; a copy of the unreported judgment is attached as Appendix A. The court of appeal summarily denied rehearing; a copy of that unreported order is attached as Appendix F. The unreported order of the Louisiana Supreme Court denying review is attached as Appendix G.

STATEMENT OF JURISDICTION

The Louisiana Court of Appeal for the First Circuit issued its judgment on December 31, 2003 and summarily denied petitioner's timely petition for rehearing on February 9, 2004. The Louisiana Supreme Court denied petitioner's timely petition for review on July 2, 2004. This Court has jurisdiction under 28 U.S.C. § 1257(a) on the basis that petitioner's rights under the Sixth Amendment of the United States Constitution have been violated.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution, applicable by the Fourteenth Amendment, provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

STATEMENT OF THE CASE

Panos Tsolainos, the defendant here, was convicted of second degree murder for the death of his ex-wife who was tragically killed in a car accident in the couple's driveway while Mr. Tsolainos was driving. The State's entire case of proving Mr. Tsolainos had the requisite intent to kill consisted of hearsay testimony that Mr. Tsolainos purportedly conspired previously to kill Mrs. Tsolainos by hiring a hit man. Despite Mrs. Tsolainos' death having no resemblance whatsoever to the alleged conspiracy (and the State later dropping all conspiracy charges against Mr. Tsolainos), the trial court admitted the "conspiracy testimony." More egregious, which is the subject of this writ application, the trial court denied Mr. Tsolainos his Sixth Amendment Constitutional right, over his objections, to confront the declarants of that hearsay testimony.

Those declarants/witnesses included: (1) Mr. Tsolainos' daughter who pled the Fifth Amendment privilege against self-incrimination; (2) a confidential police informant who committed suicide before trial; and (3) an alleged co-conspirator who pled the Fifth Amendment. The out-of-court testimony of the first witness — Mr. Tsolainos' daughter — was in the form of a taped statement she gave to the police during interrogation.[1] The out-of-court testimony of the other two witnesses — the police informant and the alleged co-conspirator — was in the form of a tape recorded conversation and a police officer's testimony repeating that out-of-court conversation.[2] The trial court admitted all of this out-

1. Introduced by the State as Exhibit S-3 at the *Prieur* Hearing on September 13, 1999.

2. Trial Exhibit S- 51, 54, 55.

of-court testimony at a pre-trial hearing where the State sought to establish a *prima facie* case of conspiracy so it could lay the foundation for introducing this same testimony at the defendant's second degree murder trial. Having found it laid the appropriate foundation, the trial court also admitted the police informant's and the alleged co-conspirator's testimony at trial. While the State did not seek to introduce the daughter's statement at trial, the trial court allowed the investigating officer to refer to the daughter's statement during trial and to testify that he relied on that statement in arresting Mr. Tsolainos.[3]

Deciding this case before this Court's ruling in *Crawford v. Washington*, 124 S. Ct. 1354 (2004), and specifically relying on the "reliability" test in the now-overruled *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), the Louisiana court of appeal affirmed the trial court's admission of these out-of-court statements. The state courts' decisions now clearly conflict with this Court's analysis in *Crawford*. *Crawford* makes clear that a defendant has the absolute right at trial to confront witnesses who give statements to the police during interrogation; otherwise, those "testimonial" statements are inadmissible. *Crawford* also makes clear that the reliability test set forth in *Roberts* no longer governs the admissibility of hearsay testimony. This case presents the opportunity for this Court to consider, in the context of the daughter's statement, whether the Confrontation Clause also prohibits the admission of "testimonial" evidence at pre-trial hearings, the sole purpose of which is to lay the predicate for introducing otherwise inadmissible evidence at trial. This case also presents the opportunity for this Court to consider further, in the context

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3. Record Volume XVI, pages 1485-1490.

of the police informant's and alleged co-conspirator's testimony, what constitutes "testimonial evidence" and the propriety of admitting highly suspect "non-testimonial" evidence in contravention of the Confrontation Clause, both issues left open by this Court in *Crawford*.

Evidence at Trial

Mr. and Mrs. Tsolainos were married for approximately ten years. When they married, Mr. Tsolainos adopted her two minor children, Clarissa and Melissa. Mr. and Mrs. Tsolainos later had two children of their own, Stephen and Stephanie. It was at the time Stephanie was born that the Tsolainos' marriage began to deteriorate. Mrs. Tsolainos had a substance abuse problem and Stephanie was born a "heroin baby." Despite Mr. Tsolainos' efforts to have Mrs. Tsolainos stop and to keep their marriage together, Mrs. Tsolainos's drug use increased. Mr. Tsolainos eventually had no choice but to divorce Mrs. Tsolainos. Mr. Tsolainos was awarded custody of the children and to protect them, a TRO was entered prohibiting her from contact with the children. In addition to taking care of their children, Mr. Tsolainos worked full time running a local shipping company. Mrs. Tsolainos, on the other hand, left Louisiana and returned to her home town of St. Louis, Missouri. Mrs. Tsolainos eventually began to call. Although the TRO prohibited Mrs. Tsolainos from contacting the children, Mr. Tsolainos allowed her to speak with the children and later to visit them. On one occasion however, Mrs. Tsolainos initially refused to return the children after her visit, but later complied.

Due to the stress of these circumstances, Mr. Tsolainos began using drugs himself for a few months. While under the influence of drugs, he had a conversation with Gerald

Branigan ("Mr. Branigan"), from whom he purchased drugs. Having told Mr. Branigan of the problems with his ex-wife, Mr. Branigan offered to get her out of the way. Mr. Tsolainos regretted the conversation immediately and never took any steps to pursue it and avoided Mr. Branigan. Mr. Branigan however was very interested in getting money from Mr. Tsolainos and so continued to pursue him. Mr. Branigan also solicited the involvement of Charles "Tinker" Schmolke ("Mr. Schmolke"). Mr. Schmolke was a confidential informant for the local sheriff's office which promised him payment for "results."[4]

Testimony of Detective Scallan:

Q: Did you have any concerns at any time with providing contingent payments to informants that might cause them to cross the line?

A: All the time.

Q: In this case, Mr. Schmolke was going to be paid on a contingency basis wasn't he? No results, no pay?

A: There was no guarantee that he was going to be paid.

Q: You didn't promise to pay him? You didn't tell him he would be compensated?

A: I told him I would compensate him I didn't promise him anything. I said I could compensate you, but I have no idea what it would be.

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4. R. Vol. XIII pp. 3018-3021, 3024, 3080-3087, 3100-3102.

Q: I didn't ask you how much. The questions was: Did you promise to pay him?

A: I didn't say, I promise I'll pay you, no.

Q: Did you think there was a distinction to be made between saying I'll compensate you and I promise to pay you.

A: I didn't pay him.

Q: You didn't pay him did you?

A: No.

Q: But you told him you would?

A: I said he could be compensated, yes.[5]

Q: Well, let me get this straight.

A: I don't have to pay anyone.

Q: You don't have to keep your word?

A: No.[6]

Detective Scallan also testified at trial that he knew Mr. Schmolke was drunk, a brawler, and inherently unstable:

> Didn't know Branigan, but from Tinker [Schmolke] I can safely assume, knowing the type of person Branigan was, he was pretty much like

5. R. Vol. X, p. 1409.

6. *Id.* at pp. 1409-1410.

> Tinker, that they're drunk, they're always loaded, and they could beat each other up in one minute and they would be hugging and kissing each other the next minute. And that's how Tinker was.[7]

Nevertheless, working at the direction of Det. Scallan, Mr. Schmolke set up a meeting with Mr. Branigan so that Det. Scallan could tape record the conversation. Det. Scallan also took partial notes of the conversation between Mr. Branigan and Mr. Schmolke, which was inaudible at times because of poor wire transmission, and later supplemented those notes from a de-briefing with Mr. Schmolke. Det. Scallan later arranged to have Mr. Schmolke meet again with Mr. Branigan and then a third time with Mr. Branigan and Melissa Tsolainos ("Melissa"). Det. Scallan attempted to record both of those conversations but those tapes showed up blank at trial.

Based on those conversations, Detective Juge of the local sheriff's department arrested Mr. Branigan and Melissa for conspiracy to commit first degree murder. During interrogation, Det. Juge obtained statements from both Mr. Branigan and Melissa. Det. Juge then arrested Mr. Tsolainos. Felony Bill of Information, Attached as Appendix E.

While he was in jail for conspiracy, Mrs. Tsolainos used the opportunity to re-gain custody of their children and the family home in Louisiana. When he was released from jail, and as a condition of his bond, Mr. Tsolainos agreed to a consent TRO keeping him from contact with Mrs. Tsolainos. Mrs. Tsolainos however contacted Mr. Tsolainos several days after he was released from jail and told him that he needed

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7. R. Vol. X, p. 1418.

to remove certain belongings from the family home or they would be thrown out the next day. Mr. Tsolainos and his girlfriend Connie Deville ("Ms. Deville") drove to the family home. To comply with the TRO, Ms. Deville dropped Mr. Tsolainos off 400 feet from the house and drove up to the house alone. Mr. Tsolainos stayed away from the house while Ms. Deville loaded up the car. On her own accord, Mrs. Tsolainos brought Stephen and Stephanie down the street to see their father. The visit was pleasant and Mr. Tsolainos and Ms. Deville left to unload the car.

Mr. Tsolainos and Ms. Deville returned later to pick up the remaining items. They used Mrs. Deville's mother's car, a 1993 Buick Skylark with a unique gear shift/windshield wiper configuration. The gear shift and the windshield wiper control were on the same side of the steering column, were remarkably similar in appearance, and were placed close together and operated in the same up and down fashion. That entire day, unfamiliar with the car, Mr. Tsolainos confused the two levers, a chronic problem with the car. When Mr. Tsolainos and Ms. Deville returned to the house, Ms. Deville again dropped Mr. Tsolainos off, this time for him to walk up to the house to make sure they could retrieve the rest of the belongings. Once Mrs. Tsolainos agreed, Ms. Deville drove the car up the driveway. The entire visit was again very amicable until Mr. Tsolainos and Ms. Deville began to leave.

While Mr. Tsolainos was saying good-bye, Stephanie (then three) wanted to leave with him; she knew him far better than her mother. Mrs. Tsolainos turned to Mr. Tsolainos and said "You used to be a good father - you can be a good father again." Mr. Tsolainos replied that he was not the one who had put the children in harms way. Mrs. Tsolainos then

erupted. Mrs. Tsolainos began screaming profanities, banging on the hood of the car, and advancing in Ms. Deville's direction. According to the Coroner, Mrs. Tsolainos' toxicology test results showed a blood alcohol level of .07 and, in his opinion, Mrs. Tsolainos consumed four to five beers within an hour of the accident. Clarissa, who was also at the house, admitted during a later motion for new trial that, contrary to her trial testimony, Mrs. Tsolainos (her mother) was drinking heavily that day.

Mr. Tsolainos and Ms. Deville attempted to leave as fast as they could. Mr. Tsolainos climbed into the driver's seat, which Ms. Deville had adjusted closer to the steering wheel when she drove the car to the house. Mr. Tsolainos started the car quickly, but in the confusion and because of the unique layout of the car's controls, he inadvertently turned on the windshield wipers instead of putting the car in reverse. After finding the gear shift and putting the car in reverse, he quickly accelerated. The car lurched backwards causing Ms. Deville, who was not completely in the passenger seat, to fall out of the car. Mr. Tsolainos stopped the car.[8]

According to Mr. Tsolainos and Ms. Deville, Mrs. Tsolainos then climbed over the hood of the car and began beating on the windshield at Mr. Tsolainos.[9] Mr. Tsolainos

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8. R. Vol. XII, XIII, pp. 2944, 2959-2162, 3056-3060.

9. R. Vol. XII, XIII, pp. 2945, 2963, 3059-3064. Clarissa testified at trial that Mr. Tsolainos directed the car at Mrs. Tsolainos and hit her in the stomach, instead of Mrs. Tsolainos' rolling off the car as Mr. Tsolainos and Ms. Deville testified. The Coroner however contradicted Clarissa's testimony because he found no injuries to Mrs. Tsolainos' mid-section consistent with impact from an automobile. (Cont'd)

focused on slapping at the lever for the windshield wipers to turn them off. With his legs cramped against the pedals and thinking Ms. Deville was back in the car, Mr. Tsolainos accelerated. The car, however, went forward instead of backwards because he had accidentally shifted it from reverse to drive while slapping at the windshield wiper lever, a syndrome called "control misapplication."[10] Mrs. Tsolainos was carried with the car 50-60 feet (not unusual in "control misapplication" which causes "hyper-vigilance," in other words, hitting the gas pedal repeatedly thinking it is malfunctioning by causing the car to go forward instead of backwards). In a freak accident, Mrs. Tsolainos fell off the car as it hit a tree and became pinned between the tree and the passenger side of the car which came down on top of her. Despite his efforts, Mr. Tsolainos was unable to get the car off of her and she died.

Procedural History

On August 13, 1998, an Indictment was filed charging Panos Tsolainos with First Degree Murder for the killing of Deborah Tsolainos on July 19, 1998 in violation of La. R.S. 14:30. Attached as Appendix D. That Indictment was amended on April 26, 1999 reducing the charges against Mr. Tsolainos to Second Degree Murder in violation of La. R.S. 14:30.1.

(Cont'd)

(R. Vol. X, IX, XII, pp. 2176-2178; 2214-2219, 2449, 2952, 2958). Clarissa also admitted under oath at a new trial hearing that she lied at trial regarding Mrs. Tsolainos' alcohol consumption and also that she promised her boyfriend, George Deforrest, $20,000 or a new truck for his trial testimony. (R. Vol. XVI, pp. 2201, 3662, 3670). Clarissa and Mr. Forrest were the key witnesses for the State at trial.

10. T. Exh. T-29-E, T-30-E, T-31.

Prior to trial, Mr. Tsolainos filed a request for notice of the State's intent to use evidence of other crimes, wrongs, or acts against him at trial pursuant to La. Code of Evidence Art. 404(B)(1).[11] The State in response notified the Defense of its intent to use at trial evidence that Mr. Tsolainos "conspired with others to commit the crime of first degree murder buy [sic] placing a contract killing on his ex-wife, Debbie Tsolainos. . . ."[12] The alleged conspiracy evidence included: (1) Melissa's statement given to the police regarding the alleged conspiracy; (2) three tapes – the two purported tape recorded meetings between police informant Mr. Schmolke and alleged co-conspirator Mr. Branigan and the third purported tape recorded meeting involving those individuals and Melissa; (3) Det. Scallan's typed "police resume" from partially overhearing the first tape recorded meeting and from his conversation with Mr. Schmolke following that meeting as well as Det. Scallan's testimony regarding all three meetings, and (4) Mr. Tsolainos' statement given to the police after his arrest for conspiracy in which he admitted speaking to Mr. Branigan but denied pursuing anything further.[13] The State sought to use this "conspiracy evidence" to show that Mr. Tsolainos intended to kill Mrs. Tsolainos when she was hit by the car; specific intent is a necessary element of second degree murder.

Mr. Tsolainos opposed the State's use of this evidence because, among other reasons, the evidence was hearsay not subject to cross-examination: "Mr. Schmolke is deceased and Mr. Branigan and Melissa have invoked their privileges against self-incrimination. As both the United States Supreme

11. R. Vol. I, p. 235.

12. R. Vol. I, p. 238.

13. T. Exh. S-58.

Court and ours have held; denial of the right of effective cross-examination is a constitutional error of the first magnitude."[14] Mr. Tsolainos also objected to the State's refusal to prosecute Mr. Branigan and Melissa on the conspiracy charges first, before his own trial of second degree murder, which thereby deprived Mr. Tsolainos of his right to cross-examine those witnesses. And, Melissa was in fact later found not guilty of those charges a mere few weeks after Mr. Tsolainos' instant trial; the charges of conspiracy were dropped against Mr. Tsolainos.[15]

The trial court denied Mr. Tsolainos' objection to the State's refusal to prosecute Mr. Branigan and Melissa first. Following a hearing, the trial court granted the State's request to use the conspiracy evidence at trial.[16] The trial court found that the State proved both an agreement and an overt act, the necessary elements to establish a *prima facie* case of conspiracy. According to the trial court, the "agreement" was Mr. Tsolainos' meeting with Mr. Branigan and the "overt act" was Mr. Branigan's soliciting Mr. Schmolke. The trial court therefore concluded that all four individuals – Mr. Tsolainos, Melissa, Mr. Branigan and Mr. Schmolke – were co-conspirators so their out-of-court testimony was admissible as co-conspirator statements under La. Code Evidence Art. 801(D)(3)(b). Mr. Tsolainos sought immediate appellate review of that decision, which was denied by the court of appeal.[17] Mr. Tsolainos then sought immediate review

14. R. Vol. II, p 265.

15. The Louisiana First Circuit Court of Appeal in its Opinion noted that Melissa was acquitted at her trial. (Attached as Appendix A, page 23a, note 4).

16. R. Vol. II, p. 301.

17. R. Vol. II, p. 340.

by the Louisiana Supreme Court, which also denied review.[18]

On the morning of trial, Mr. Tsolainos moved the trial court to reconsider its ruling on the admissibility of the conspiracy evidence, which the trial court denied.[19] During trial, Mr. Tsolainos again objected to the introduction of this evidence. The trial court, while initially allowing Det. Scallan to testify about the second and third tape recordings, eventually held they were inadmissible because the tapes were both blank. Despite allowing the jury to hear Det. Scallan's testimony which it later ruled inadmissible, the trial court denied Mr. Tsolainos's motion for mistrial and instead instructed the jury to disregard Det. Scallan's testimony regarding those meetings.[20] The trial court, over Mr. Tsolainos' continued objection, however allowed the State to introduce the first tape recorded meeting between Mr. Schmolke and Mr. Branigan. The trial court now admitted Mr. Schmolke's testimony for a different reason than it expressed at the pre-trial hearing. Recognizing its previous error in finding Mr. Schmolke was a co-conspirator, because he was a police informant, the trial court admitted his testimony this time on the basis that it was not hearsay because it was not offered for its truth but only to put Mr. Branigan's testimony in context.[21] The trial court also over Mr. Tsolainos' objection permitted the State to introduce

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18. R. Vol. II, p. 355.

19. R. Vol. II, V, pp. 344, 1062-66.

20. R. Vol. X, pp. 2276-2279, 2295-2299, 2468-2470.

21. R. Vol. X, p. 2275. Even the Louisiana First Circuit Court of Appeal in its Opinion duly noted that Mr. Schmolke was not a co-conspirator. (Attached as Appendix A, p. 67a-68a).

during trial Det. Scallan's notes and testimony regarding the first meeting.[22] The State did not introduce Melissa's statement at trial but the court allowed Detective Juge to refer to her statement in his testimony, including that it formed the basis for arresting Mr. Tsolainos on the conspiracy charges.

Mr. Tsolainos was convicted of second degree murder. He was sentenced to life in prison. See Verdict of the Jury, attached as Appendix C, and Minutes from the Sentencing, attached as Appendix B.

Mr. Tsolainos filed several motions for new trial, which the trial court denied. Mr. Tsolainos then appealed his conviction which the Louisiana Court of Appeal for the First Circuit affirmed on December 31, 2003. The court of appeal affirmed the trial court's finding of a *prima facie* case of conspiracy. The court of appeal agreed with the trial court that the "agreement" was Mr. Tsolainos' meeting with Mr. Branigan and the "overt act" was Mr. Branigan contacting Mr. Schmolke, but confusing the agreement stage with overt acts, the court of appeal also stated that "agreeing on a price, working out a method by which defendant could let Branigan know if it were safe for him to return to St. Tammany Parish, [and] agreeing to furnish a photograph of Deborah Tsolainos to Branigan" also constituted overt acts.[23] Although Mr. Tsolainos' statement never references Mr. Branigan's

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22. R. Vol. VII, pp. 1534-1545. Det. Scallan's handwritten notes appeared for the first time on the morning of trial and was the first and only evidence alleging Melissa was actively involved in the conspiracy.

23. The Louisiana First Circuit Court of Appeal Opinion attached as Appendix A, page 64a.

meeting with Mr. Schmolke, the court of appeal further stated that Mr. Tsolainos' statement alone supported the existed of the conspiracy and the recorded conversation of Mr. Schmolke and Mr. Branigan bolsters it.

After affirming the trial court's finding of a *prima facie* case of conspiracy, and based on the same reasons as the trial court, the court of appeal then affirmed the trial court's admission of Mr. Schmolke's and Mr. Branigan's testimony at trial. The court of appeal however did not address the admissibility of Melissa's statement at all. On the critical Sixth Amendment issue, the court of appeal, despite writing a 69 page opinion, merely stated that this Court "resolved the relationship between the rules of evidence and the Confrontation Clause" in *Ohio v. Roberts* and then summarily concluded: "From our review of the record, we find the contested statement in the instant case was a co-conspirator's statement with referential 'indicia of reliability.' Thus, its admission into evidence was not a violation of the Confrontation Clause." Opinion attached as Appendix A, at page 69a, quoting *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). The court of appeal conducted no analysis whatsoever and did not even articulate which of the three witnesses' statements it was addressing. Mr. Tsolainos moved for rehearing, which was denied by the court of appeal on February 9, 2004.

On March 8, 2004, this Court decided *Crawford v. Washington*, 124 S. Ct. 1354 (2004). On March 10, 2004, specifically citing this Court's decision in *Crawford*, Mr. Tsolainos sought review by the Louisiana Supreme Court. Mr. Tsolainos pointed out that this Court overruled *Ohio v. Roberts*, upon which the court of appeal specifically relied, and now made clear that the Sixth Amendment guarantees a

defendant the right to cross-examine all testimony admitted against him. For that principal reason, Mr. Tsolainos urged the Louisiana Supreme Court to exercise its discretionary jurisdiction and correct the erroneous decisions of the lower courts. The Louisiana Supreme Court denied Mr. Tsolainos' request for review on July 2, 2004.

REASONS FOR GRANTING THE PETITION

A. This Court should determine whether the Confrontation Clause applies to "testimonial" evidence submitted at pre-trial hearings which form the basis for introducing otherwise inadmissible evidence at trial.

The admission of Melissa's statement at trial would have clearly violated Mr. Tsolainos' Sixth Amendment rights. *Crawford* is on point on that issue.

In *Crawford*, the defendant's wife gave a statement to the police but later refused to testify at trial by invoking her right under the state's marital privilege. Despite the defendant's inability to cross-examine her at trial, the state court admitted the wife's statement on the basis that it was reliable. This Court reversed. "Where testimonial evidence is at issue, . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination." *Crawford*, 124 S. Ct. at 1374. The wife's statement to the police constituted "testimonial evidence." "Whatever else the term ['testimonial'] covers, it applies at a minimum to prior testimony at a preliminary hearing before a grand jury, or at a former trial; and **to police interrogations**." *Id.* (emphasis added). Because the State admitted the wife's "testimonial statement against petitioner, despite the fact that he had no opportunity to cross examine her," this Court held

"[t]hat alone is sufficient to make out a violation of the Sixth Amendment." *Id.* at 1374.

Here, Mr. Tsolainos' daughter Melissa gave a statement to the police, but asserting her Fifth Amendment right, she later refused to testify. The trial court nevertheless admitted Melissa's statement at the pre-trial hearing and allowed Det. Juge to refer to her statement at trial on the basis that it was a co-conspirator's statement under La. Code Evidence Art. 801(D)(3)(b). Despite the trial court's ruling, Melissa's statement clearly was not a co-conspirator's statement under 801(D)(3)(b) because it was not a statement given in furtherance of a conspiracy, but rather a statement given to the police during interrogation. The court of appeal, of course, did not address the admissibility of Melissa's statement at all and when discussing the Sixth Amendment issue, it did not specify to which statement it was referring when it found "*the* contested statement" was a "co-conspirator's statement with referential 'indicia of reliability.'" To the extent the court of appeal was addressing Melissa's statement, it apparently realized her statement was not in furtherance of the alleged conspiracy, and thus not admissible under article 801, because the court of appeal determined, albeit conclusory, that the statement was reliable under *Ohio v. Roberts*. Regardless of the lower courts' various decisions, *Crawford* makes clear that Melissa's statement was "testimonial" evidence and that the Sixth Amendment guarantees Mr. Tsolainos the absolute right to confront all testimonial evidence against him. Because Det. Juge referred to Melissa's statement at trial and testified that he relied on it in arresting Mr. Tsolainos, Mr. Tsolainos was denied his Constitutional right to confront all testimonial evidence against him.

To the extent Det. Juge's trial testimony alone, rather than the admission of Melissa's statement at trial, would not violate Mr. Tsolainos' Sixth Amendment right, this Court should consider whether *Crawford* extends to testimonial evidence admitted at pre-trial hearings. The results of pre-trial hearings generally form the foundation for the admissibility of evidence at trial and in fact did so in this case. The State used Melissa's statement, which would be inadmissible at trial under *Crawford*, at a pre-trial hearing to prove a *prima facie* case of conspiracy so that it could introduce at trial other alleged conspiracy evidence which, without the *prima facie* foundation, would also be inadmissible at trial. If *Crawford* does not extend to pre-trial motions, the State could do (and would be encouraged to do) through pre-trial motions what it cannot do at trial. In the end, Melissa's statement was testimonial evidence used against Mr. Tsolainos in a criminal proceeding; that should raise the exact same concerns where this Court in *Crawford* countenanced "the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 1374. Mr. Tsolainos was denied that Constitutional right.

B. This Court should determine whether a police informant's out-of-court testimony constitutes "testimonial" evidence and thus, under *Crawford*, is subject to Confrontation Clause scrutiny.

The tape recorded conversation of Mr. Schmolke and Mr. Branigan arguably does not fall within *Crawford*'s minimal definition of "testimonial evidence." However, to allow the introduction of a police informant's testimony in this context, without cross-examination, is tantamount to the

same sacrosanct violation of the Sixth Amendment which concerned this Court in *Crawford.*

This Court defined "testimonial evidence" in *Crawford* as including *at a minimum* prior testimony before a grand jury or at a former trial and statements made during police interrogations. Although leaving "for another day any effort to spell out a comprehensive definition of 'testimonial,'" this Court highlighted the concerns of the Framers and their design for the Confrontation Clause.

> Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse – a fact borne out time and again throughout the history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.

Id. at n.7.

This Court also rejected the reasoning that the Sixth Amendment does not apply where the law enforcement questioner is neutral and not inclined to advance the declarant's interest or to shade the truth unfavorably against the defendant, which was a basis the trial court in *Crawford* found the wife's statement "reliable."

> The Framers would be astounded to learn that *ex parte* testimony could be admitted against a

> criminal defendant because it was elicited by "neutral" government officers.

Id. at 1373.

All of these same concerns are magnified in Mr. Tsolainos' case. Here, you have a police informant working directly with law enforcement for the sole purpose of "the production of testimony with an eye toward trial." Additionally, under no stretch of the imagination could you even consider Mr. Schmolke's intent "neutral." The police not only promised Mr. Schmolke compensation but only for producing results. His goal therefore was to obtain incriminating testimony. Moreover, the testimony at issue here is Mr. Schmolke's himself, not the testimony of someone he is eliciting, like Mr. Branigan whose testimony is discussed separately below. In other words, the trial court admitted the highly prejudicial out-of-court testimony of a police informant whose sole purpose was to provide incriminating testimony for a prospective criminal trial against Mr. Tsolainos and who had an incentive to ensure that his testimony was full-proof to convict Mr. Tsolainos.

If, as this Court stated in *Crawford*, the Framers would be astounded by the admission of out-of-court testimony elicited by "neutral" government officers, the Framers would roll over in their graves to learn that *ex parte* testimony of a police informant who gets paid for results could be admitted without cross-examination. Review by this Court would resolve this issue and provide further guidance as to what constitutes "testimonial evidence" requiring cross-examination under the Sixth Amendment.

C. Even if a police informant's testimony constitutes "non-testimonial" evidence, this Court should consider whether the Confrontation Clause imposes an absolute bar to police informant testimony absent a prior opportunity for cross-examination.

This Court noted in *Crawford* that it was presented with two proposals: (1) applying the Confrontational Clause only to testimonial statements, leaving the remainder to regulation by hearsay law; or (2) imposing an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examination. *Id.* at 1370. This Court adopted the second proposal, and while recognizing that it rejected the first proposal in *White v. Illinois*, 502 U.S. 346, 112 S. Ct. 737, 116 L. Ed. 2d 848 (1992), this Court did not need to reach the first proposal in *Crawford*. *Id.* This case makes the first proposal, or its continued *per se* rejection, ripe for consideration.

The trial court here admitted Mr. Schmolke's testimony at trial on the basis that it was not hearsay because it was not offered to prove the truth of his statements but only to put Mr. Branigan's testimony in perspective. The court of appeal apparently affirmed the admission of his testimony because it found it "reliable." The trial court's and court of appeal's reasoning, albeit perhaps differing ones, is precisely what concerned this Court in *Crawford*.

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability."

Id. at 1370.

Because *ex parte* evidence is "non-testimonial" instead of "testimonial," should the "vagaries of the rules of evidence" or the "amorphous notions of 'reliability'" prescribe a defendant's Sixth Amendment constitutional right? The problems associated with doing so are highlighted here. The trial court originally admitted Mr. Schmolke's testimony on the basis that he was a co-conspirator; it later admitted it on the basis that it was not hearsay. Considering the trial court's revolving bases, it would be more apt to question here whether the amorphous notions of the vagaries of the rules of evidence determine a defendant's Constitutional right to cross-examine witnesses against him.

With respect to the court of appeal, to the extent it was addressing Mr. Schmolke's testimony, it apparently found Mr. Schmolke's testimony reliable despite that he was a police informant being paid by the police for results or that the investigating officer using Mr. Schmolke personally knew he was a drunk, a brawler, and unreliable. Mr. Schmolke was also so unstable that he committed suicide shortly before trial. Moreover, evidence not available at the time of trial, but presented at a motion for new trial and which was before the court of appeal, revealed the following about Mr. Schmolke: the police agreed to help Mr. Schmolke and his girlfriend with pending criminal charges in exchange for Mr. Schmolke's acting as an informant in this case; Mr. Schmolke had a chronic drug use and criminal history beyond that revealed by the State prior to trial; Mr. Schmolke was related to members of the local sheriff's office; Mr. Schmolke was "high" when he tape recorded the conversations with Mr. Branigan; Mr. Schmolke had been arrested for beating up Mr. Branigan three days before Mr. Tsolainos was arrested for conspiracy; and Mr. Schmolke

was well-known by a juror, who was his neighbor, which the juror concealed at trial.[24]

The court of appeal's "amorphous, if not entirely subjective," notion of reliability, especially in a case with such incredibly suspect testimony, is exactly the reason that this Court imposed an absolute right to cross-examination in *Crawford*.

> The legacy of *Roberts* in other courts vindicates the Framers' wisdom in rejecting a general reliability exception. The framework is so unpredictable that it fails to provide a meaningful protection from even core confrontation violations.

Id. at 1371.

Moreover, what must be kept firmly in mind in this case is that the State did not introduce the hearsay statements of Mr. Schmolke and Mr. Branigan at trial to prove the alleged conspiracy which, by any logical measure, was discontinued (if it ever existed) with the arrest of Messrs. Brannigan and Tsolainos and Melissa Tsolainos. Rather, the State offered the hearsay statements to prove Mr. Tsolainos' state of mind three weeks later with respect to a death which bore no factual or legal similarity to the alleged conspiracy. In admitting the tape, the courts below myopically focused solely on that conversation without consideration for Mr. Tsolainos' inability to confront those witnesses regarding his state of mind during the critical three week period which followed. The recording, to which Mr. Tsolainos played no part, also

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24. R. Vol. II, III, pp. 497-537.

attributes highly prejudicial comments to him regarding the conspiracy, yet Mr. Tsolainos again was unable to cross-examine those witnesses on those comments which were used later at his second degree murder trial for a completely different purpose. This dichotomy in time and context also raises serious questions about courts' individualized applications of a "reliability" exception to the Confrontation Clause.

This Court can make clear that the general reliability exception in *Roberts* no longer survives *Crawford*, even as to non-testimonial evidence. This Court can also make clear that a police informant's testimony, regardless of any evidentiary semantics, cannot under any circumstances circumvent Sixth Amendment scrutiny.

D. This Court should consider whether an alleged co-conspirator's statement, which is premised solely on a hearsay foundation and is so inherently suspect, is nevertheless admissible without cross-examination simply because it might satisfy Code of Evidence article 801(D)(3)(b).

The State's "evidence" of the conspiracy in this case of second degree murder was dependant entirely on Messrs. Branigan and Schmolke's tape recorded conversation, Mr. Schmolke's comments to Det. Scallan, and Melissa's and Mr. Tsolainos' statements to the police. All of this testimony was hearsay, except perhaps Mr. Tsolainos' statement. His statement alone however was insufficient as a matter of law to establish a *prima facie* case of conspiracy because, at best, it could only show an "agreement." The trial court in fact found the "overt act" was Mr. Branigan's solicitation of Mr. Schmolke, which, not only was nowhere in Mr. Tsolainos'

statement, but Mr. Tsolainos was not aware of the solicitation and it could only be proved through Det. Scallan's testimony of uncorroborated statements made to him by Mr. Schmolke himself. While the court of appeal found additional overt acts of "agreeing on a price," "working out a method," and "agreeing to furnish a picture," and attributed these at least in part to Mr. Tsolainos' statement, those constituted part of the "agreement" stage and were not "overt acts." Overt acts would be the payment of money, obtaining something in furtherance of the method, or furnishing a picture. Not only did none of that occur, but they are nowhere in Mr. Tsolainos' statement. In the end, the only testimony to support an overt act – Mr. Branigan soliciting Mr. Schmolke – was through comments made by Mr. Schmolke to Det. Scallan. Thus, based on hearsay evidence alone, and without any opportunity for Mr. Tsolainos to cross-examine those witnesses, the lower courts found the elements for a *prima facie* case of conspiracy existed.

With that foundation, the trial court then admitted that same hearsay evidence at trial based on various evidentiary grounds, which again denied Mr. Tsolainos any opportunity to cross-examine those witnesses. In the case of Mr. Schmolke's testimony, the trial court held it was not hearsay and so was admissible without cross-examination. With respect to Mr. Branigan's testimony, the trial court held it was a co-conspirator's statement and thus was admissible without cross-examination under article 801(D)(3)(b). The trial court also used its finding of a *prima facie* case of conspiracy as the basis for admitted Mr. Tsolainos' statement, which was highly prejudicial and otherwise would have been inadmissible. The court of appeal affirmed the trial court's admission of Mr. Schmolke's and Mr. Branigan's testimony on the same evidentiary grounds and found no Confrontation Clause violation because "the statement" was reliable.

Accordingly, these lower courts' decisions hold for the first time that a criminal conspiracy may be proved entirely by hearsay evidence. This Court has never extended Federal Rules of Evidence article 404 to that extent, *Bourjaily v. United States*, 483 US 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987) and, until this case, no Louisiana court had allowed it. *Tritt v. Gares*, 733 So. 2d 659 (La. App. 4 Cir. 1999).

The court of appeal's decision below also for the first time permits the reliability, and thus the admission, of out-of-court statements to be determined based on other hearsay testimony. This Court has specifically stated that "hearsay evidence used to convict a criminal defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Idaho v. Wright*, 497 U.S. 805, 822, 110 S. Ct. 3139, 3150, 111 L. Ed. 2d 638 (1990). In other words, this Court refused to allow the state to "bootstrap" on other evidence to establish the admissibility of an incriminating hearsay statement which the Confrontation Clause would otherwise deem inadmissible. *Id.* at 823, 110 S. Ct. at 3150. In *Lilly v. Virginia*, 527 U.S. 116, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999), this Court's plurality opinion again rejected the contention that a non-testifying accomplice's confession was reliable in part because it was corroborated by the accounts of other witnesses and the accounts of another accomplice's trial testimony. This Court specifically held that because "other evidence at trial corroborates portions of [an accomplice's] statement is irrelevant." *Lilly*, 527 U.S. at 137, 119 S. Ct. at 1900.

The lower courts here have engaged not in single bootstrapping but in double bootstrapping, and all with hearsay testimony involving a completely separate alleged

offense. Melissa's statement and Mr. Schmolke's testimony, because in no circumstances could they qualify as co-conspirators' statements under Art. 801, were first bootstrapped on one another and perhaps with Mr. Branigan's testimony (and Mr. Tsolainos' statement) so that they could be deemed reliable and admitted to prove a *prima facie* case of conspiracy. After the initial bootstrapping to lay the *prima facie* foundation, all three statements were then bootstrapped on one another so they could be deemed reliable and admitted at a trial for second degree murder. And, all of this bootstrapping was done with hearsay evidence on top of hearsay evidence. At least in *Wright* and *Lilly*, the hearsay evidence was bootstrapped onto trial testimony. Moreover, the hearsay evidence being bootstrapped here was obtained for a completely different charge than the crime being prosecuted and introduced for the purpose of proving a state of mind, namely the intent to kill.

This case presents this Court with the opportunity to consider many issues in the context of co-conspirators' statements. First, it presents this Court with the opportunity to determine whether a *prima facie* case of conspiracy, the necessary foundation for admitting an alleged co-conspirator's statement, can be established solely through hearsay evidence. Next, this case presents the opportunity for this Court to consider whether, through bootstrapping on other evidence, an otherwise inadmissible hearsay statement at a pre-trial hearing becomes a potentially self-admitting co-conspirator's statement at trial, and even if so for evidentiary purposes, whether its admissibility at trial is still subject to a defendant's right to cross-examination under the Confrontation Clause. Finally, because of all of the foregoing issues, this case the presents the opportunity for this Court to consider imposing an absolute bar to the admission of co-

conspirators' statements absent a prior opportunity for cross-examination, which was left open by *Crawford*.

This Court in *Crawford* presumably rejected *per se* the use of "reliability" as the standard for admitting out-of-court statements, even as to non-testimonial evidence, and instead only left open the question as to whether hearsay law determines the admissibility of non-testimonial evidence. This Court further suggested in *Crawford* that hearsay law might govern the admissibility of non-testimonial evidence because it inherently incorporates a reliability standard, at least with respect to "firmly rooted hearsay exceptions."

This case raises the question whether a "co-conspirator's" testimony given to a police informant who is personally beholden to the police and also working for payment falls within a firmly rooted hearsay exception, in other words, is inherently reliable. This case also raises the question whether any presumption of reliability generally afforded by a "firmly rooted hearsay exception" can be or should be overcome by overwhelming indicia of unreliability. And if so, whether that implicates this Court's concerns in *Crawford* over the "amorphous, if not entirely subjective" determination of reliability and the potential for "core confrontation violations" to occur nevertheless because of inconsistent applications among courts.

CONCLUSION

This Petition for Writ of Certiorari should be granted. As an alternative to plenary review, this petition should be granted, the judgment of the Louisiana Court of Appeal for the First Circuit vacated and this case remanded to that court for further consideration in light of *Crawford*. *See, e.g.*, other cases where this Court remanded in light of *Crawford*: *Ko v. New York*, 124 S. Ct. 2839 (2004); *Goff v. Ohio*, 124 S. Ct. 2819 (2004); *Prasertphong v. Arizona*, 124 S. Ct. 2165 (2004); *Corona v. Florida*, 124 S. Ct. 1658 (2004); *Shields v. California*, 124 S. Ct. 1653 (2004).

Respectfully submitted,

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